THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0598, Samuel Ronci & a. v. Town of Franconia & a., the court on May 12, 2005, issued the following order:

The petitioners, Samuel Ronci and Carol Ronci, appeal an order of the trial court affirming a decision of the Franconia Zoning Board of Adjustment (ZBA) to grant a special exception to respondents, Kenneth and Diane King. We affirm.

Our review of zoning cases is limited. Fox v. Town of Greenland, 151 N.H. __, __, 864 A.2d 351, 355 (2004). The burden is on the party seeking to set aside the decision of the ZBA to show the decision is unreasonable or unlawful. Id. In the trial court, the appealing party must demonstrate that an error of law was committed or must persuade the court by the balance of probabilities that the board's decision was unreasonable. Id. We will uphold the decision of the trial court unless it is unsupported by the evidence or legally erroneous. Duffy v. City of Dover, 149 N.H. 178, 180 (2003).

The petitioners first contend that the respondents failed to submit sufficient information to the ZBA to support their request for a special exception to permit Business District B use in Residential B District. The trial court found no merit in this contention. Under the town zoning ordinances, the ZBA may grant such an exception if certain site coverage and lot size limitations are met and the use is neither a nuisance nor generally inappropriate for the neighborhood. The trial court found that the ZBA had considered the effect of any increased traffic and noted that it would be minimal and not negatively affect the neighborhood. The ZBA also found minimal impact would be caused by any increased noise, given the already prevalent chainsaw use in the area and that the new building would reflect the traditional construction in the neighborhood. The ZBA discussed a letter from a realtor submitted by the petitioners concerning the effect on property values that would allegedly be caused by the variance but discounted it as speculative. Having reviewed the record before us, we find no error in the trial court's consideration of this issue.

The petitioners also argue that the respondents' business is restricted to the town's Business District A. The town's zoning ordinances establish two business districts: Business District A includes all Business District B uses and "retail stores, offices, wholesale and light industrial, garage and filling station or other business use whose operation is compatible and not offensive or injurious or a nuisance to its neighborhood." Business District B uses

include retail shops, professional offices "or other business, the operation and appearance of which is compatible with the neighborhood in terms of building scale and residential character."

Our review of the interpretation of a zoning ordinance is de novo. Fox v. Town of Greenland, 151 N.H. at ___, 864 A.2d at 357. At the ZBA hearing, the respondents described their business as a full-service home care business that primarily services the neighboring Mittersill Village. The petitioners argue that, because it also includes residential construction, the business is more akin to a light industrial use; therefore, they contend it is restricted to Business District A. We disagree.

The town zoning ordinances distinguish between business district classifications on the basis of both building scale and residential character. We find no evidence in the record that the respondents' proposed business use was not compatible in scale to a retail shop or professional office. The petitioners also argue that the determination of residential character must be limited to the nature of the immediately surrounding residences. The trial court found that the parcel of land was located in Mittersill Village which included 185 homes and the Mittersill Inn, consisting of 52 timeshare units. The record before us provides evidence that the respondents' business was to operate from a chalet-style building similar to the Mittersill fire station. Accordingly, we find no error in the trial court's ruling that the respondents' business was a permissible use in Business District B.

The petitioners also argue that the trial court erred in concluding that the ZBA was not required to consider the effect of restrictive covenants when reviewing the respondents' application for a special exception. The petitioners cite no authority and we are aware of none to support their argument. Moreover, it appears we have not been provided with a copy of the order in which the trial court first addressed this issue and both declined to join the claim with the ZBA appeal and noted that other interested property owners had not been joined. Accordingly, we decline to address this issue. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) (burden on appealing party to provide record sufficient to decide issues raised on appeal).

Finally, the petitioners argue that the trial court erred when it ruled that the ZBA's statement that the special exception was "personal to the applicant" was a misstatement rather than an error of law requiring rehearing. The ZBA concedes that its decision to grant an exception applicable to the property

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owner rather than the property was in error. This, however, does not invalidate the special exception. See Vlahos Realty Co. v. Little Boar's Head District, 101 N.H. 460, 464 (1958). While the petitioners argue that they were entitled to personal notice of the town's subsequent vote to modify the variance, they cite no statutory authority to support their argument and we are aware of none. It is undisputed that the corrective action took place at a properly posted meeting.

Having reviewed the record before us, we find no error in the trial court's ruling.

Affirmed.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Eileen Fox
Clerk